

FCC MAIL SECTION

Federal Communications Commission

DA 99-727

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DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 99-123
Table of Allotments,)	RM- 9502
FM Broadcast Stations.)	
(Royston and Commerce, Georgia))	

NOTICE OF PROPOSED RULEMAKING**Adopted:** April 7, 1999**Released:** April 16 , 1999**Comment Date:** June 8, 1999**Reply Date:** June 15, 1999

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rulemaking filed by Southern Broadcasting of Athens, Inc. ("Southern"), licensee of WPUP(FM), Channel 279C3, Royston, Georgia, which seeks changes to the FM Table of Allotments by reallocting Channel 279C3 from Royston to Commerce, Georgia, and modifying the license for Station WPUP(FM) to specify Commerce as its new community of license.¹

2. Southern's proposal is filed under the provisions of Section 1.420(i) of the Commission's Rules, which permits modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990). Southern states that the proposed reallocation of Channel 279C3 to Commerce is mutually exclusive with the existing allotment at Royston, would not deprive that community of its only local transmission service, and does not require relocation of Station WPUP(FM)'s transmitter site.²

3. Southern states that the community of Commerce is incorporated and lies in Jackson County, Georgia. It gives its 1990 population as 4108. Station WJJC(AM) provides the only local aural service to Commerce.³ Channel 279C3 permits the provision of its first local FM service. Southern notes that its proposal would result in no service loss either in Royston or in its

¹ Southern had earlier filed a similar petition for rulemaking, requesting a reallocation from Royston to Commerce, which the Commission returned as unacceptable. *See note 7, infra.*

² The coordinates for Station WPUP(FM)'s transmitter site are North Latitude 34° 14' 13" and West Longitude 83° 16' 03".

³ Station WJJC(AM) is authorized to operate with powers of 5 kW during the day and 173 W at night.

listening area because it would not change its transmitter site, and would not deprive Royston of its only local transmission service, now provided by Royston Station WBIC(AM).⁴

4. However, Southern claims that no conflict exists between a construction permit for Station WDDK(FM), Channel 280A, Greensboro, Georgia (license application pending), and its Station WPUP(FM), despite the existence of a short-spacing.⁵ It argues that Station WDDK's construction permit facilities protect Station WPUP under Section 73.215 of the Commission's Rules,⁶ and that "there is no transmitter site move proposed toward WDDK." However, "should the Commission consider WDDK to be a constraint," Southern offers a fully-spaced reference point for its proposed allotment, from which a city-grade signal may be placed over the entirety of Commerce.⁷

5. Southern argues that its proposal serves the public interest because Commerce is "substantially larger than Royston, with 1350 more persons," thus satisfying Priority Four of the Commission's allotment priorities set out in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).⁸ Thus, a preferential arrangement of allotments would result from the reallocation of Channel 279C3 to Commerce. Finally, Southern states its intention to timely file an application to construct, and, if granted, to implement whatever changes the Commission directs to operate Station WPUP at Commerce.

6. Accordingly, we believe that Southern's rulemaking petition warrants consideration. A staff engineering analysis has confirmed that, using the allotment reference point specified by Southern, Channel 279C3 can be allotted to Commerce in compliance with the Commission's

⁴ WBIC(AM) is a daytime-only station, authorized to operate with a power of 230 W.

⁵ We note that the construction permit for WDDK is short-spaced 4.4 km to the current transmitter site for WPUP.

⁶ That application (File No. BPH-970818IE) has now been granted as a construction permit to enable Station WDDK(FM), Greensboro, Georgia to operate at a maximum 6 kW. The application to cover that license has been filed and is currently pending (File No. BLH-981127KC).

⁷ The reference coordinates proposed by Southern for Channel 279C3 at Commerce are North Latitude 34° 15' 58" and West Longitude 83° 28' 44", which specifies a site restricted to 7.2 km (4.5 miles) north of Commerce. These coordinates specify the fully-spaced reference site that was included in Southern's petition for reconsideration of its returned petition for rulemaking. This site was offered as an alternate to the rulemaking site. The rulemaking petition was returned because it was short-spaced to the earlier-filed application. In any event, we will dismiss its petition for reconsideration as moot, Southern's instant petition for rulemaking being fully compliant with our Rules.

⁸ The FM Allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

minimum distance separation requirements, and that a city-grade signal can be placed over all of Commerce. While Southern claims that no conflict exists with Station WDDK at Greensboro inasmuch as no change in transmitter site is proposed for its Station WPUP, we note that the construction permit application for Station WDDK granted under Section 73.315 created a short-spacing. In authorizing the use of contour protection and directional antennas at the applications stage, the Commission did not contemplate the creation of short-spaced allotments at the rulemaking stage. *See Report and Order* in MM Docket No. 87-121, 4 FCC Rcd 1681 (1989). Therefore, Southern has specified an alternate site that does not violate the proscription against creating short-spaced allotments. This restricted site meets the Commission's minimum distance requirements for the allotment of Channel 279C3 at Royston, and is the site proposed by Southern for its requested change of community of license. *See Chester and Wedgefield, South Carolina*, 4 FCC Rcd 4503 (1989). However, we have located and, thus, propose a site that requires the least restriction. *See Chico, California*, 6 FCC Rcd 4294 (1991). Given that this site does not coincide with that of Station WPUP, we request that Southern perform a gain and loss study as to the number of listeners who would be served by the new allotment and those who would lose the service provided from Station WPUP's current transmitter site.⁹

7. As requested, we also propose to modify the license for Station WPUP to specify operation on Channel 279C3 at Commerce, Georgia as its new community of license. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest from other parties in the use of Channel 279C3 at Commerce or require Southern to demonstrate the availability of an additional equivalent class channel for use by such parties.

8. In seeking comment on Southern's proposal, we note that it would result in providing the larger community of Commerce its first local fulltime and first competitive service under Priority Four of the Commission's allotment priorities. By way of contrast, retaining the Royston allotment would enable the continued provision of the only fulltime and competitive service at the smaller community of Royston. As noted above, reallocating Channel 279C3 to Commerce would not remove from Royston its sole local transmission aural service; Station WBIC(AM) would remain. In view of the above, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

<u>Community</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Royston	279C3	-----
Commerce	-----	279C3

⁹ The coordinates of the least restrictive site are North Latitude 34° 15' 07" and West Longitude 83° 29' 06", which represents a site restriction of 5.9 km (3.7 miles) northwest of Commerce.

9. The Commission's authority to institute rulemaking proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments may file on or before June 8, 1999, and reply comments on or before June 15, 1999, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, DC 20554. Additionally, a copy of such comments should be served on petitioner's counsel, as follows:

Gary S. Smithwick
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, DC 20036

The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rulemaking proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 60 and 604 of the Regulatory Flexibility Act Do Not Apply to Rulemaking to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11,549, February 9, 1981.

11. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rulemaking proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rulemaking until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment that has not been served on the petitioner constitutes an *ex parte*

presentation and shall not be considered in the proceeding. Any reply comment which has been served on the person(s) who file the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rulemaking* to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rulemaking* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rulemaking* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W.; TW-A325, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Public Reference Room (room 239) at the Commission's headquarters, 1919 M Street, N.W., Washington, D.C. 20554.